

They have full power to see that sales are made fairly, and with due notice, and to exact security from the administrator, in proportion to the increased funds which may come to his hands. These precautions, assisted by the attention of the creditors to their own interest, will, I flatter myself, produce sales to the greatest advantage, and faithful application of their proceeds. 1806.

My opinion is, that the defendant, the purchaser at the sale ordered by the Orphan's Court, holds the land, discharged from the plaintiff's judgment.

YEATES, *Justice*, who was present at the argument, informed the chief justice that he concurred with this opinion; and

BRACKENRIDGE, *Justice*, expressed his concurrence, generally.

Judgment to be entered for the defendant.

Morgan *et al.* versus The Insurance Company of North America.

THIS was an action upon a policy of insurance, on the freight of the brig *Amazon*, valued at 3,500 dollars, upon a voyage from *Philadelphia* to *Surinam*. The policy contained a warranty of *American* property, and the usual clause against illicit trade.

On the trial of the cause, before the chief justice, at *Nisi Prius*, in *July* 1806, it appeared that upon the 7th of *August* 1799, when *Surinam* was in possession of the *Dutch*, the vessel sailed on the voyage insured, and arrived at the river of *Surinam*, on the 17th of *September* following; that the brig was detained at the entrance of the river, by the commander of the *British* fort, who informed the captain, that the colony of *Surinam* had been in possession of the *British* forces about twenty days; that the captain, and a passenger of the name of *J. G. Richter* (who was an inhabitant of *Surinam*, and to whom the cargo was deliverable there, on his paying 25,310 dollars, in pursuance of a contract with the plaintiffs, *Morgan* and *Price*) proceeded to the town of *Paramanto*, and the cargo was there tendered and agreed to be accepted by *Richter*; who gave security for paying the stipulated price, as soon as possible after the delivery, in conformity to the contract. On the 19th of *September*, the governor of the colony gave permission for the brig to be brought up to town, where she, accordingly, arrived the next day, for the purpose of discharging her cargo; that on reporting, however, to the custom-house, the collector declared, that he would not permit any article to be landed, excepting the provisions, (which did not amount to more than one-eighth of the cargo) and that permission to land the cargo generally, was repeatedly solicited by the captain, but refused by the governor; in consequence of which, it was brought back to *Philadelphia*.

1806. *Philadelphia*. Upon these facts, related in the captain's protest (1) the plaintiffs abandoned, and claimed for a total loss of the freight insured. And it was agreed to state them in a case, for the opinion of the Court.


The general question was, whether the plaintiffs were entitled to recover, either for a total, or for a partial, loss of freight? And the solution was considered, by the counsel on both sides, as depending upon the inquiry, whether the freight had been earned, in whole, or in part; and if not, whether the loss was occasioned by a peril enumerated in the policy.

For the plaintiff. By the bill of lading, the master is obliged to deliver the goods, (the danger of the seas only excepted) and freight is only payable on the delivery. *Beawes, Lex Merc.* 137. *Ab.* 179. 183. If a foreign government prevents a landing of the cargo, it prevents an earning of the freight, by an arrest, restraint, and detainment; as much, surely, as in the decided case, of the foreign government refusing to permit a cargo to be shipped, for which the vessel was sent. 3 *Bos. and Pull.* 295. 8 *T. Rep.* 267. 1 *Brownl.* 21. 7 *T. Rep.* 385. *Abbot*, 261. 3 *Bac.* 610. *Lex Merc.* 267. *Park*, 292. 3 *Rob. Rep.* 152, 3. 7 *T. Rep.* 383. 2 *Vern.* 176. *Perot v. Penrose, in Supreme Court of Pennsylvania.* A policy on goods continues in force till the goods are landed. 1 *Marsh.* 162. and all policies should be liberally construed, for the benefit of trade. *Ibid.* 164, 5. In the present case, there is no proof of the delivery of the cargo at *Surinam*; but, on the contrary, it appears, that *Richter* agreed to pay for it, as soon as possible after it was delivered; and as the delivery depended upon the landing, it is virtually disproved by the evidence, that the governor always refused to grant a permit for the landing.

For the defendant. On the evidence, there was an arrival of the vessel at her port of discharge; and the tender and acceptance of the delivery of the cargo, entitled the owner to his freight. The owner of the ship was not bound to procure a permission to land the goods. Besides, it is not denied, that seamen's wages were paid; and wages are never payable, but in cases where the freight is earned. But even the loss, if established, was not occasioned by a peril insured against. There was no arrest, no restraint, no detainment; but merely the refusal of a right of entry. *Ord. L.* 14. 1 *Val.* 656. *Art.* 15. *Ib.* 626. *Art.* 7. *Doug.* 622. 626, 7. *Poth.* 60. s. 69. 2 *Marsh.* 454, 5, 6, 7. 1 *Marsh.* 162. 164, 5. *Ab.* 161. 2 *Burr.* 887.

(1) When the protest was offered to be read, the defendant's counsel observed, that the Circuit Court of the *United States* had refused to admit the protest in evidence, and submitted the competency of such evidence on the present occasion. But by the Court, The practice of *Pennsylvania* has been long settled. The protest has invariably been received as evidence in the state Courts:

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The chief justice delivered the following opinion, in which 1806.
BRACKENRIDGE *Justice*, concurred. 

TILGHMAN, *Chief Justice*. This is an action on a policy of insurance on freight of the brig *Amazon*, from *Philadelphia* to *Surinam*, valued at 3500 dollars.

The brig sailed from *Philadelphia* on the 7th of *August* 1799 with a cargo consisting of provisions and merchandize, and arrived in the river *Surinam*, on the 17th of *September* following. During the voyage, the colony of *Surinam* was conquered by the forces of the king of *Great Britain*. Permission was obtained from the *British* commander, for the brig to go up to the town of *Paramanto*, and she arrived there with her cargo, on the 20th *September*. On her arrival, the captain of the brig, in pursuance of instructions from the owners, as well as in pursuance of an agreement between the owners and a certain *J. A. Richter*, who was a passenger in the said brig, offered to deliver the cargo to the said *Richter*, upon his paying, or giving security to pay, 25,310 dollars. *Richter* agreed to pay that sum *as soon as possible after the delivery of the cargo*, and actually gave good security for the money. But the *British* collector of the customs, refused permission to land any article of the cargo, except the provisions, nor could such permission be obtained, although repeated petitions were presented to the government. The consequence was, that the cargo was not landed, and the captain entered his protest. The brig remained at *Paramanto* till the 27th of *September*. The plaintiffs were owners both of the brig and cargo.

The question is, whether the plaintiffs are entitled to recover, either for a total loss, or for a partial loss, on this policy?

The plaintiffs' counsel contend, that they are entitled to recover for a total loss; that the landing and delivery of the cargo, is an essential part of the contract between the owner and freighter, and not being complied with, no part of the freight has been earned; and that the circumstance of the same persons being owners of the brig and cargo, is immaterial in a question between the assurers and assured. On the other hand, the defendants' counsel say, that there has been no loss, because the freight was completely earned.

No adjudged case, in point, has been cited on either side. The defendants' counsel relied on the case of *Blight v. Page*. 3 *Bos. and Pull.* 295. (*not.*) but I do not think that case applicable. The owner of a vessel agreed to go to a certain port, and take in a cargo of barley, to be carried on freight. When the vessel arrived at the port, the defendant, could not furnish the cargo according to his agreement, because the government refused to permit the exportation of barley. The owner sued the defendant, for not complying with his contract, and recovered damages equal to the amount of the freight. This only shews, that the interference of the government did not excuse the defendant from complying

1806. { with his contract. The plaintiff had done every thing necessary on his part, and was prevented from earning his freight, by the breach of contract on the part of the defendant. No conclusion can be drawn from this case, under what circumstances freight may be earned, or not earned. For, it was not an action for the recovery of freight, but of damages, for not being permitted to earn freight.

But, although there is no adjudged case, the subject has not escaped the notice of writers on the marine law. In one of the ordinances of *Lewis XIV.* (A. D. 1681) (1) it is declared, that on a charter party to carry goods *out* and *in*, if, during the voyage, the commerce is prohibited and the vessel returns, the outward freight only is earned; and *Valin*, in his commentary on this article, says, the law is the same, if the vessel is freighted *outward only*. These ordinances, and the commentaries on them, have been received with great respect, in the Courts both of *England* and the *United States*; not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country, they are not to be respected. But on points which have not been decided, they are worthy of great consideration. I am strongly inclined to adopt the rule laid down by *Valin*, because I think it reasonable. The owner of the ship has been in no fault whatever. When he took the goods on freight, there was an open commerce between *Philadelphia* and *Surinam*; the goods were carried to the port of delivery; the vessel waited there seven days, and the captain offered to deliver the cargo to the consignee, who refused to receive it. Nothing prevented it, but the prohibition of the *British* government. It is not like the case of a vessel which is prevented from entering the port of delivery, by a blockading squadron; for there the voyage is not performed, and it is impossible to say, *certainly*, that it would have been safely performed, if there had been no blockade. I think it most agreeable to reason and justice, that the obtaining permission to land the cargo, should, in this case, be considered as the business of the consignee. That being established, it follows that the freight was earned.

Upon the whole of this case, I am of opinion, that the plaintiffs are not entitled to recover, either for a total or a partial loss.

(1) 1 *Vol. Ord. Lewis XIV.* 656. Art. 15. title *Freight*, cited by *Abbot*.